Antenuptial contracts before or after my Customary Marriage?

The Constitutional Court's judgment in VVC v JRM has important implications for couples married under customary law and for the validity of antenuptial contracts (ANCs). The decision brings much-needed clarity to a legal area that has caused uncertainty for many families.

Customary Marriages and Property Regimes

A customary marriage is fully recognised in South African law and enjoys the same legal status as a civil marriage. Unless the parties conclude an antenuptial contract before the customary marriage, the marriage is automatically in community of property.

Historically, it was common practice—particularly before the formal recognition of customary marriages—for couples to conclude a customary marriage first and later enter into a civil marriage. Since customary marriages are now legally recognised on an equal footing with civil marriages, this practice is no longer necessary and may in fact create legal complications.

Once a customary marriage has been validly concluded, it remains binding and can only be dissolved by divorce or death.

Warning Against a Second Marriage Ceremony

The Constitutional Court confirmed that parties should not conclude a civil marriage after a customary marriage in an attempt to change their matrimonial property regime. Concluding a civil marriage does not terminate or replace the existing customary marriage.

If parties wish to be married out of community of property, an antenuptial contract should ideally be entered into before the customary marriage. This ensures clarity and legal certainty from the outset.

What If the Antenuptial Contract Is Signed After the Marriage?

Where spouses conclude an antenuptial contract after a customary marriage has

already been entered into, the agreement is treated as a postnuptial contract. In such cases, the contract will only be valid if it is approved by the High Court, in terms of

section 21 of the Matrimonial Property Act. Judicial oversight is required to protect both spouses, particularly the financially weaker party.

Customary marriages are legally binding and carry significant property consequences. Couples should obtain proper legal advice before entering into a customary marriage, particularly where they intend to exclude community of property. Attempting to "fix" the position later can be complex, costly, and uncertain.

By Johannes Mokotedi